

WordPerfect Document Compare Summary

Original document: K:\CHRIS\current 1.5.wpd

Revised document: @PFDesktop\MyComputer\K:\CHRIS\SJC Committee proposed rule 1.5 (revised).wp

Deletions are shown with the following attributes and color:

~~Strikeout~~, Blue RGB(0,0,255).

Deleted text is shown as full text.

Insertions are shown with the following attributes and color:

Double Underline, Redline, Red RGB(255,0,0).

The document was marked with 89 Deletions, 109 Insertions, 0 Moves.

COMPARISON OF PROPOSED AND CURRENT RULE 1.5

RULE 1.5 FEES

~~1. (a)~~

(a)

A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee

or collect an unreasonable amount for expenses. The factors to be considered in determining whether a fee is clearly excessive include the following:

~~(1)~~

(1)

the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

~~(2)~~

(2)

the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

~~(3)~~

(3)

the fee customarily charged in the locality for similar legal services;

~~(4)~~

(4)

the amount involved and the results obtained;

~~(5)~~

(5)

the time limitations imposed by the client or by the circumstances;

~~(6)~~

(6)

the nature and length of the professional relationship with the client;

~~(7)~~

(7)

the experience, reputation, and ability of the lawyer or lawyers performing the services; and

~~(8)~~

(8)

whether the fee is fixed or contingent.

~~(b) When~~

(b)

The scope of the lawyer's representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation:

~~(c)~~ except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c)

A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Except for contingent fee arrangements concerning the collection of commercial accounts and of insurance company subrogation claims, a contingent fee agreement shall be in writing and signed in duplicate by both the lawyer and the client within a reasonable time after the making of the agreement. One such copy (and proof that the duplicate copy has been delivered or mailed to

the client) shall be retained by the lawyer for a period of seven years after the conclusion of the contingent fee matter. The writing shall state:

~~(1)~~

(1)

the name and address of each client;

~~(2)~~

(2)

the name and address of the lawyer or lawyers to be retained;

~~(3)~~

(3)

the nature of the claim, controversy, and other matters with reference to which the services are to be performed;

~~(4)~~

(4)

the contingency upon which compensation ~~to~~will be paid, ~~and~~ whether and to what extent the client is to be liable to pay compensation otherwise than from amounts collected for him or her by the lawyer, and if the lawyer is to be paid any fee for the representation that will not be determined on a contingency, the method by which this fee will be determined;

~~(5)~~

(5)

the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer out of amounts collected, and unless the parties otherwise agree in writing, that the lawyer shall be entitled to the greater of (i) the amount of any attorney's fees awarded by the court or included in the settlement or (ii) the amount determined by application of the percentage or other formula ~~applied~~ to the recovery amount not including such attorney's fees; ~~and~~

~~(6)~~

(6)

the method by which litigation and other expenses are to be ~~deducted~~calculated and paid or reimbursed, whether expenses are to be paid or reimbursed only from the recovery, and whether such expenses are to be deducted from the recovery before or after the contingent fee is calculated;

(7)

if the lawyer intends to pursue such a claim, the client's potential liability for expenses and reasonable attorney's fees if the attorney-client relationship is terminated before the conclusion of the case for any reason, including a statement of the basis on which such expenses and fees will be claimed, and, if applicable, the method by which such expenses and fees will be calculated; and

(8)

if the lawyer is the successor to a lawyer whose representation has been terminated before the conclusion of the case, whether the client or the successor lawyer is to be responsible for payment of former counsel's attorney's fees and expenses, if any such payment is due.

Upon conclusion of a contingent fee matter for which a writing is required under this paragraph, the lawyer shall provide the client with a written statement ~~stating~~explaining the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

~~(d)~~ At any time prior to the occurrence of the contingency, the lawyer shall, within twenty days after either 1) the termination of the attorney-client relationship or 2) receipt of a written request from the client when the relationship has not terminated,

provide the client with a written itemized statement of services rendered and expenses incurred; except, however, that the lawyer shall not be required to provide the statement if the lawyer informs the client in writing that he or she does not intend to claim entitlement to a fee or expenses in the event the relationship is terminated before the conclusion of the contingent fee matter.

(d)

A lawyer shall not enter into an arrangement for, charge, or collect:

~~(1)~~

(1)

any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

~~(2)~~

(2)

a contingent fee for representing a defendant in a criminal case.

~~(e)~~

(e)

A division of a fee (including a referral fee) between lawyers who are not in the same firm may be made only if, ~~after informing the client~~ the client is notified before or at the time the client enters into a fee agreement for the matter that a division of fees will be made, ~~the client and~~ consents to the joint participation in writing and the total fee is reasonable. This limitation does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

(f)

(f1)— The following form of contingent fee agreement may be used to satisfy the requirements of paragraphs (c) and (e) if it accurately and fully reflects the terms of the engagement. The authorization of this form shall not prevent the use of other forms consistent with this rule.

(2) A lawyer who uses a form of contingent fee agreement that contains provisions that materially differ from or add to those contained in the following form shall explain those different or added provisions to the client and obtain the client's informed consent to those provisions confirmed in writing. This requirement shall not apply when the client is an organization, including a non-profit or governmental entity. A fee agreement containing a statement in which the client specifically confirms with his or her signature that the lawyer has explained that there are provisions of the fee agreement, clearly identified by the lawyer, that materially differ from, or add to, those contained in the model agreement set out in Rule 1.5(f) will meet the "confirmed in writing" requirement.

CONTINGENT FEE AGREEMENT

To be Executed in Duplicate

Date: _____, 19

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The Client _____

(Name) (Street & Number) (City or Town)

retains the Lawyer _____

Lawyer

(Name) (Street & Number) (City or Town)

to perform the legal services mentioned in paragraph (1) below. The lawyer agrees to perform them faithfully and with due diligence.

~~(1)~~

(1)

The claim, controversy, and other matters with reference to which the services are to be performed are:

~~(2)~~

(2)

The contingency upon which compensation is to be paid is:

~~(3)~~ recovery of damages, whether by settlement, judgment or otherwise.

(3)

The lawyer agrees to advance, on behalf of the client, all out-of-pocket costs and expenses. The client is not to be liable to pay ~~compensation or~~ court costs and expenses of litigation ~~otherwise, other~~ than from amounts collected for the client by the lawyer, ~~except as follows:~~

~~(4)~~

(4)

Compensation (including that of any associated counsel) to be paid to the lawyer by the client on the foregoing contingency shall be the following percentage of the (gross) (net) [indicate which] amount collected. [Here insert the percentages to be charged in the event of collection. These may be on a flat rate basis or in a descending scale in relation to the amount collected.] The percentage shall be applied to the amount of the recovery not including any attorney's fees awarded by a court or included in a settlement. The lawyer's compensation shall be such attorney's fees or the amount determined by the percentage calculation described above, whichever is greater. ~~[Modify the last two sentences as appropriate if the parties agree on some other basis for calculation.]~~

(5)

[IF APPLICABLE] The client understands that a portion of the compensation payable to the lawyer pursuant to paragraph 4 above shall be paid to [Name of Attorney entitled to a share of compensation] and consents to this division of fees.

(6)

[IF APPLICABLE] If the attorney-client relationship is terminated before the conclusion of the case for any reason, the attorney may seek payment for the work done and expenses advanced before the termination. Whether the lawyer will be entitled to receive any payment for the work done before the termination, and the amount of any payment, will depend on the benefit to the client of the services performed by the lawyer as well as the timing and circumstances of the termination. Such payment shall not exceed the lesser of (i) the fair value of the legal services rendered by the lawyer, or (ii) the contingent fee to which the lawyer would have been entitled upon the occurrence of the contingency. This paragraph does not give the lawyer any rights to payment beyond those conferred by existing law.

(7)

[IF LAWYER IS SUCCESSOR COUNSEL] The lawyer is responsible for payment of former counsel's reasonable attorney's fees and expenses and the cost of resolving any dispute between the client and prior counsel over fees or expenses.

This agreement and its performance are subject to Rule 1.5 of the Rules of Professional Conduct adopted by the Massachusetts Supreme Judicial Court.

WE EACH HAVE READ THE ABOVE AGREEMENT BEFORE SIGNING IT.

Witnesses to signatures

Signatures of client and lawyer

(To client) _____

(Signature of Client)

(To lawyer) _____

(Signature of client)

(To lawyer) _____

(Signature of lawyer)

(If more space is needed separate sheets may be attached and initialed.)

Comment

Basis or Rate of Fee

[1] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to the fee ~~shoulds~~ and expenses must be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

[1A] Rule 1.5(a) departs from Model Rule 1.5(a) by retaining the standard of former ~~DR 2-106~~ DR 2-106(A) that a fee must be illegal or clearly excessive to constitute a violation of paragraph (a) of this rule. However, it does not affect the substantive law that fees must be reasonable to be enforceable against the client.

[1B]

[1B] Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. As such, the standard differs from that for fees, as described in Comment 1A. A lawyer may seek reimbursement for the cost of services performed in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

[2] Rule 1.5(b) states, as the ABA Model Rule does, that the basis or rate of a fee shall be communicated "preferably" "preferably in writing." Appropriate caution and ease of proof of compliance with Rule 1.5(b) indicate that the presentation of a fee arrangement agreement to a the client in writing is desirable.

[3] Contingent fees, like any other fees, are subject to the not-clearly-excessive standard of paragraph (a) of this rule. In determining whether a particular contingent fee is clearly excessive, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such

as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain matters. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should inform the client of alternative bases for the fee and explain their implications.

[3A] Because the client's expectation in most contingent fee cases is that no legal fee or payments for expenses will be owed unless and until the contingency occurs, a lawyer must inform the client at the time representation is undertaken if there is a possibility that a legal fee or other payments will be owed under other circumstances. A lawyer may pursue a quantum meruit recovery or payment for expenses advanced only if the contingent fee agreement so provides.

[3B] The "fair value" of the legal services rendered by the attorney before the occurrence of a contingency in a contingent fee case is an equitable determination designed to prevent a client from being unjustly enriched if no fee is paid to the attorney. Because a contingent fee case does not require any certain amount of labor or hours worked to achieve its desired goal, a lodestar method of fee calculation is of limited use in assessing a quantum meruit fee. A quantum meruit award should take into account the benefit actually conferred on the client. Other factors relevant to determining "fair value" in any particular situation may include those set forth in Rule 1.5(a), as well as the circumstances of the discharge or withdrawal, the amount of legal work required to bring the case to conclusion after the discharge or withdrawal, and the contingent fee to which the lawyer would have been entitled upon the occurrence of the contingency. Unless otherwise agreed in writing, the lawyer will ordinarily not be entitled to receive a fee unless the contingency has occurred. Nothing in this Rule is intended to create a presumption that a lawyer is entitled to a quantum meruit award when the representation is terminated before the contingency occurs.

[3C] When the attorney-client relationship in a contingent fee case terminates before completion, and the lawyer makes a claim for fees or expenses, the lawyer is required to state in writing the fee claimed and to enumerate the expenses incurred, providing supporting justification if requested. In circumstances where the lawyer is unable to identify the precise amount of the fee claimed because the matter has not been resolved, the lawyer is required to identify the amount of work performed and the basis employed for calculating the fee due. This statement of claim will help the client and any successor attorney to assess the financial consequences of a change in representation.

[3D] A lawyer who does not intend to make a claim for fees in the event the representation is terminated before the occurrence of the contingency entitling the lawyer to a fee under the terms of a contingent fee agreement would not be required to use paragraph (6) of the model form of contingent fee agreement specified in Rule 1.5(f)(1) in situations where that form is required or to enumerate the work performed. However, if a lawyer expects to make a claim for fees if the representation is terminated before the occurrence of the contingency, the lawyer must advise the client of his or her intention to retain the option to make a claim by including the substance of paragraph (6) of the model form of contingent fee agreement in the engagement agreement and would be expected to be able to provide records of work performed sufficient to support such a claim.

Terms of Payment

[24] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to ~~special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.~~

~~[3]the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.~~

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. ~~When there is doubt whether~~

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained.

~~This provision does not preclude a contract for a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.~~

Division of Fee

~~[4]for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.~~

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee ~~after disclosure of the fact of division to, and consent by, the client. It does not require disclosure to the client of the share that each lawyer is to receive. Moreover, as under the former rule, the total fee must be reasonable to be enforced.~~

~~[4A]if the client has been informed that a division of fees will be made and consents in writing. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.~~

[7A] Paragraph (e), unlike ABA Model Rule 1.5(e), does not require that the division of fees be in proportion to the services performed by each lawyer unless, with a client's written consent, each lawyer assumes joint responsibility for the representation. ~~Paragraph (e) is substantively the same as former DR 2-107, which was adopted by the Justices in 1972 without subparagraph (A)(2) of DR 2-107 of the ABA Code (prescribing the basis for fee division).~~ The Massachusetts rule

does not require disclosure of the fee division that the lawyers have agreed to, but if the client requests information on the division of fees, the lawyer is required to disclose the share of each lawyer.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[59] In the event of a fee dispute not otherwise subject to arbitration, the lawyer should conscientiously consider submitting to mediation or an established fee arbitration service. If such procedure is required by law or agreement, the lawyer shall comply with such requirement. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

[6] Former Rule 3.05(6), with its limitations period for challenging. For purposes of paragraph 1.5(f)(2), a provision requiring that fee disputes be resolved by arbitration is a provision that differs materially from the form of contingent fee agreements, was eliminated as inappropriate for a disciplinary rule. agreement set forth in this rule and is subject to the prerequisite that the lawyer explain the provision and obtain the client's consent, confirmed in writing.

Form of Fee Agreement

[710] Rule 1.5(f)(1) provides a form of contingent fee agreement that may be used, ~~as did S.J.C. Rule 3.05, which was repealed on the adoption of the Massachusetts Rules of Professional Conduct. The new form largely follows the language of the form that appeared in S.J.C. Rule 3.05. Inclusion of the reference to court costs and expenses of litigation in clause (3) reflects the permission granted in Rule 1.8(e)(1) to make repayment of such costs and expenses contingent on the outcome of the matter. Deletion of the reference to "reasonable compensation" that appeared in clause (4) of the former form makes no substantive change. The.~~ Rule 1.5(f)(2) provides that, except where the client is an organization, including a non-profit or governmental entity, a lawyer must explain to the client any provisions that materially differ in substance from or add to those contained in the form and obtain the client's specific written consent to the use of these provisions. The form contingent fee agreement is specifically designed to contain provisions most favorable to the client. To the extent permitted by this rule, the lawyer and the client are free to agree to modifications of this agreement which are more favorable to the lawyer; however, where Rule 1.5(f)(2) requires it, the lawyer is bound to explain these modifications to the client and to obtain the client's specific written consent to any provision that differs from the form. For example, where Rule 1.5(f)(2) applies, unless the lawyer and client explicitly contract otherwise in the contingent fee must be reasonable to be enforced against agreement, the lawyer provides an explanation, and the client consents in writing, a lawyer who undertakes representation of a client in a contingent fee matter after the client has discharged prior counsel will, as provided in paragraph (7) of the model form, be responsible for payment of former counsel's reasonable attorney's fees and expenses, as well as for the costs of resolving a dispute between the client and may not be clearly excessive in order to avoid violating Rule 1.5(a). See Comment 1A.
(8) prior counsel over fees or expenses.

[11] When attorney's fees are awarded by a court or included in a settlement, a question arises as to the proper method of calculating a contingent fee. Rule 1.5(c)(5) and paragraph (4) of the form agreement contained in Rule 1.5(f)(1) state the default rule, but so long as the lawyer provides any explanation required by Rule 1.5(f)(2), the parties may agree on a different basis for such calculation, such as applying the percentage to the total recovery, including attorney's fees.

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